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Nos. 84-1355 and 84-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant, Baptist Joint Committee on Public Affairs, through its attorney Earl W. Trent, Jr., moves the Court for leave to appear and file the accompanying Brief in this case as *Amicus Curiae* pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States.

The consent of appellees, through their counsel, Lee Boothby, has been obtained and is filed simultaneously with the filing of this Motion, but intervenor-appellants, Dempster and Pauline Ferguson, et al., through their

counsel, Charles H. Wilson, have refused to consent. Appellants, William J. Bennett, Secretary of the United States Department of Education, et al., through their counsel, Michael W. McConnell, Assistant to the Solicitor General, have given oral consent, and written consent will be filed with the Court upon receipt by counsel for movant.

Movant, Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight national cooperating Baptist conventions and conferences in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North America Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Convention; and Southern Baptist Convention. These Baptist groups have nearly thirty million members and reflect the traditional Baptist concern for proper church-state relations.

Movant has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental actions, ... Among Baptists, religious liberty is a fundamental and sacred principle. Movant has a continuing vital interest in preserving religious liberties under the Constitution.

This *Amicus Curiae* Brief attempts to present to this Court additional insights based upon Baptist experience in church-state matters. For numerous years prior to the enactment of the First Amendment to the Constitution of the United States and subsequent to its enactment, Baptists have expressed their views on the principle of religious liberty.

Movant continues that practice today with the hope that this brief will assist the Court in its deliberations.

For the foregoing reasons, movant respectfully prays that this Motion be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether an on-premises remedial instruction program supported with Federal Funds under Title I of the Elementary and Secondary Education Act of 1965, as administered in Missouri's religiously affiliated schools, violates the First Amendment to the United States Constitution.

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BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the Baptist Joint Committee on Public Affairs files this brief in opposition to the Appellants' Jurisdictional Statement dated February 22, 1985.

INTEREST OF *AMICUS CURIAE*

The Baptist Joint Committee on Public Affairs is composed of representatives elected by eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention.

The Committee, in part, seeks to apply the traditional Baptist concerns for religious liberty and proper church-state relations to public affairs. For nearly 40 years the Baptist Joint Committee has served as the voice of most Baptists in their concern for religious liberty and the separation of church and state. Though the Joint Committee has never been a litigant in church-state cases, it has filed *amicus* briefs in 20 cases beginning with *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and most recently in *Bender* v. *Williamsport Area School District*, 741 F.2d 538 (1984), petition for *cert.* granted. In these briefs *amicus* has been able to add an additional perspective to the legal issues which might not have been brought to the courts otherwise. *Amicus* believes its insights in the case at bar will be of assistance to this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2. Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 2701 *et seq.* (1982). *See* Appendix D of Appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented in Appellees' Motion to Affirm.

REASONS FOR DENYING THE APPELLANTS' JURISDICTIONAL STATEMENT

Baptists believe that the receipt of public educational benefits should not be conditioned upon a student's religious beliefs. However, the administration of an educational benefits program that also serves private school students must comport with the constitutional requirement that church and state be separated. Therefore, as this Court has long held, there must not be a risk of excessive entanglement between church and state in any school, whether public or nonpublic.

Baptists agree with the decision of the district court below that the Title I bypass provision, as currently administered in the State of Missouri (on the premises of religiously affiliated schools), creates excessive entanglement between church and state, and thus violates the Establishment Clause of the First Amendment. The injunction issued by the district court, however, was stayed pending disposition by this Court of *Felton* v. *Secretary United States Dept. of Education*, 739 F.2d 48 (2nd Cir. 1984), *cert. granted*, ____ U.S. ____ (1984). Another case pending before this Court will also have an impact on the district court's injunction in the case at bar. *See School District of Grand Rapids* v. *Ball*, 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 104 S.Ct. 1412 (1984) (Establishment Clause challenge to a state-funded program providing

courses to private school students at their private schools).

Instead of holding the case at bar in abeyance pending the decisions in *Felton* and *Grand Rapids*, the Baptist Joint Committee on Public Affairs urges this Court to give full and plenary consideration to the case at bar prior to deciding *Felton* and *Grand Rapids*, or in the alternative, to defer the decisions in *Felton* and *Grand Rapids* until argument has been heard in the present case. As shall be discussed in this brief, both *Felton* and *Grand Rapids* have inadequate factual records when compared to the extensive factual record in the case at bar. The factual record in this case will allow this Court to reach an informed decision with respect to the issue of publicly-funded educational benefits given to private school students on premises of religiously affiliated schools. Baptists fear that the inadequate records in *Felton* and *Grand Rapids* will lead this Court to reverse its holding in *Meek* v. *Pittenger*, 421 U.S. 345, 95 S.Ct. 1753 (1975) (where this Court struck down a Pennsylvania program which provided teaching and other services in nonpublic schools by public personnel on the grounds that it presented an unbearable risk of entanglement between church and state). The Baptist Joint Committee on Public Affairs believes that this Court's holding in *Meek* is correct and should be affirmed. A reconsideration of *Meek* based on cases presented with inadequate factual records may result in impermissible entanglement by the government with the affairs of religious schools. The Baptist Joint Committee on Public Affairs believes that the provisions of public educational benefits to private school students must be off the premises of religiously affiliated schools to be constitutional.

I

THIS COURT SHOULD GIVE FULL AND PLENARY CONSIDERATION TO THE *WAMBLE* CASE PRIOR TO ANY DECISION IN *FELTON* AND *GRAND RAPIDS* SINCE WAMBLE PRESENTS A CLEARER PICTURE OF THE PROBLEMS INHERENT IN THE PROVISION OF TITLE I BENEFITS IN RELIGIOUSLY AFFILIATED SCHOOLS.

Neither *Felton* nor *Grand Rapids* presents a detailed, comprehensive picture of the problems inherent in government-funded remedial educational services provided to educationally disadvantaged school children on the premises of religiously affiliated schools. In *Felton*, six federal taxpayers brought suit challenging New York City's use of Title I funds to finance programs which involved sending public school teachers and other professionals into religious schools to provide remedial instruction and clinical and guidance services. 739 F.2d at 52. The parties in *Felton* stipulated that the case was to be decided upon the record in the case of *National Coalition for Public Education & Religious Liberty* v. *Harris*, 489 F.2d 1248, appeal dismissed, 449 U.S. 808, 101 S.Ct. 55 (1980) (hereafter cited as "PEARL," involving a similar challenge to the same program at issue in *Felton*), along with certain affidavits. Id. In *PEARL*, the evidence was presented "in the form of a narrative summary which synthesized numerous affidavits and documentary evidence describing the operation of the City's Title I program in nonpublic schools. A few witnesses were also called." *Felton*, 73 F.2d at 52. The district court in *PEARL* found that the program as carried out did not violate the Establishment Clause and dismissed the complaint. Id. An appeal to the Supreme Court was dismissed for want of jurisdiction. Id. Thus, the record in *PEARL* was a mere summary of the evidence. That same record was relied upon by the parties in *Felton*, which only involved a motion for summary judgment.

In *School District of Grand Rapids*, various citizens of the City of Grand Rapids, Michigan, challenged as taxpayers a Shared Time and Community Education Program operated by the School District of the City of Grand Rapids on school premises owned and operated by religious denominations. 718 F.2d at 1390. The case was heard by the district judge in an eight-day trial. Id. That judge recused himself, and the case was transferred to another judge, who by stipulation of the parties, decided the case on the basis of transcript testimony and other written documentary evidence. Id. The District Court held that public tax support for the programs in the parochial schools, in spite of measures taken to eliminate the risk of entanglement, had an impermissible effect of advancing religion and entangling the government with religion. Id. at 1391. The Court of Appeals for the Sixth Circuit affirmed. Id. at 1408. It must be noted that *Grand Rapids* did not involve the Title I program, but rather a state-funded program. For this reason, even though the issues may be similar to those in the case at bar, the record in *Grand Rapids* is inadequate to deal with the issues presented in *Felton* and *Wamble*.

Although *Amicus* agrees with the holdings in *Felton*, it believes that the present case of *Bennett* v. *Wamble*, 77-0254-CV-W-8 (W.D. Mo. Nov. 28, 1984), presents a complete and more detailed description of how Title I is typically administered. The record in *Wamble* is extensive. The case was first filed in 1977, and extensive discovery has been conducted by both parties since that time. After four and a half years of pendency, the case came to trial in 1982. The court held twenty-three separate days of trial (while *Felton* was a motion-for-summary-judgment case). (App. 2a). *Wamble* even deals with an aspect of the Title I program which was not scrutinized in *Felton*—the bypass program. Whereas the

Title I program in *Felton* relied on public school teachers to provide the on-premises remedial services, *Wamble* dealt with the hiring of an independent contractor to provide those services after the Secretary of Education deemed that public school teachers could not be sent to the parochial schools. If this Court decides *Felton* and not *Wamble*, the constitutionality of this bypass program will remain unclear since *Felton* did not involve such a program. This will mean that even if sending public school teachers to the parochial schools is held by this Court to be unconstitutional, the use of independent contractors for the provision of such services will continue the entanglement of government with the affairs of religiously affiliated schools under the by-pass program.

Furthermore, the factual setting in *Felton* is very different from the factual setting in *Wamble*. In *Felton*, there were no cited instances of government entanglement with religion. In *Wamble*, on the other hand, there were several. For example, in 1976, representatives of the parochial schools in Missouri asked the U.S. Secretary of Education to consider a bypass of the state and local educational agencies. (App. 8a). The Director of Governmental Programs for the Archdiocese of St. Louis wrote a letter to the State Board of Education protesting the State Board of Education's refusal to provide remedial teachers within the parochial schools. (App. 9a). In the same year, the Secretary of Education authorized the implementation of the bypass provision. (App. 10a). Not only did the government immediately invoke the bypass provision at the request of the parochial schools, but it hired a religiously affiliated contractor to perform the remedial services in the parochial schools—the Blue Hills Home Corporation (BHHC). The district court found that at the time the initial award was made for the bypass program, BHHC was a religiously affiliated entity. (App.

11a). BHHC was incorporated as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including Father Norman Rotert. Id. It operated out of office space owned by the church, and many of the teachers hired were affiliated with the church. Id. Although the district court noted that BHHC changed its apparent character and became "ostensibly neutral" (by moving its operations to a commercial mall, and having 79% of the teachers assigned to schools with religious affiliations different from their own), the facts remain that the executive director of BHHC is a former Catholic priest who attended a seminary with Father Rotert, and 21% of the teachers are being sent to schools affiliated with their own religion. (App. 11a).

In 1980, the Department of Education required BHHC to obtain assurances from nonpublic school officials that the facilities were religiously neutral. However, the Department did not define what was meant by "religiously neutral," and BHHC did not define that term for the nonpublic school principals. (App. 14a). Many Title I rooms were labeled as "Title I" rooms without any notice to students that Title I was operated by the federal government and not by the religious school. (App. 15a). Religious symbols were found inside Title I classrooms on fifteen occasions. Id. Although the symbols and artifacts were removed from some classrooms, in at least one instance the removal occurred amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop. Id. Furthermore, the evidence indicated that "other incidents may have occurred—a Title I teacher would not necessarily report the presence of a religious symbol if handled without argument at the 'school level.' " Id.

Amicus submits that the factual setting in *Wamble* best portrays how the government and parochial schools are becoming entangled with the affairs of each other in violation of the establishment clause. The evidence of this entanglement in *Wamble* is more than the mere risk of entanglement which the court in *Felton* considered crucial. If this Court decides *Felton* without considering the facts in *Wamble*, this Court could find that on-premises instruction by public teachers in nonpublic schools can be carried out without any risks of entanglement. The lack of evidence of entanglement in *Felton*, together with the system of surveillance implemented by the New York City officials in that case would support that view. *Wamble*, however, shows that no matter how much neutrality is sought there will inevitably be instances of entanglement as shown by the record. *Amicus* contends that *Meek* should be preserved as the law of the land in order to prevent the entanglement present in *Wamble*. Whether it is public school teachers or teachers hired by an independent contractor, publicly-funded personnel inside parochial schools "are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religion is constantly maintained." Meek, 421 U.S. at 371. This the establishment clause does not permit.

II

THE ON-PREMISES REMEDIAL INSTRUCTION PROGRAM IN *WAMBLE* EXCESSIVELY ENTANGLES THE STATE WITH THE AFFAIRS OF THE PAROCHIAL SCHOOLS WHILE AN OFF-PREMISES PROGRAM WOULD NOT CREATE SUCH ENTANGLEMENT.

In *Wolman* v. *Walter*, 433 U.S. 299, 247 97 S.Ct. 2593 (1977), this Court emphasized that the danger of

entanglement present in *Meek* "arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. . . . The danger existed there, not because the public employee was likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter this behavior from its normal course." This Court noted in *Wolman* that "[s]o long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise." Id. The nature of the services in *Wamble*, since they are provided on the premises of the parochial schools, precisely creates the danger of entanglement that this Court wanted to avoid in *Meek*. The key to the issue is that the facilities be *religiously neutral*, something which the facilities in *Wamble* are not. Therefore, remedial services provided to students in parochial schools must be provided off of the premises of the religiously affiliated school, whether public school teachers are employed, or whether a bypass alternative is chosen. After all, "[s]upervision of public employees performing public functions on public property does not create any entanglement between church and state." *Wolman*, 433 U.S. at 248. "Instruction conducted on the premises of pervasively sectarian institutions, on the other hand, while providing a practical response to the growing economic needs of parochial schools and the state, creates in Missouri an unacceptable risk that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance." *Wamble*, (App. 33a).

As this Court espoused in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 797-98, 93 S.Ct. 2955 (1973), it is known "from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to

escalate in cost, and to generate their own aggressive constituencies." If the decision in *Meek* is reversed because of the inadequate factual record of *Felton*, this Court would be ignoring the type of entanglement that is present in *Wamble*. Consequently, if on-premises instruction is sanctioned, the on-premise programs will most likely become entrenched and escalate in costs. Most importantly, on-premises instruction will continue entangling the state with the affairs of the church and the parochial schools—an evil which this Court has long shunned. *Wamble*, not *Felton*, contains the extensive evidentiary record that this Court has required in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). *Wheeler* involved a challenge by parents of children attending nonpublic schools in Kansas City, Missouri. The parents complained that the Missouri education officials were violating Title I by not making expenditures for children in parochial schools. The state officials contended that the best solution was to provide on-premises remedial instruction during regular school hours, but that such solution would violate the establishment clause. This Court decided not to rule on the constitutionality of the on-premises program, noting that "the First Amendment implications [of a program] may vary according to the precise contours of the plan that is formulated." 417 U.S. at 426. This Court also pointed out that "[i]t [would have been] wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan [was] before us." Id. *Wamble* presents a plan that has been in effect for more than five years and with "contours" clearly delineated in the record.

Wheeler is very relevant to the case at bar because it represents the first case in which this Court gave plenary consideration to the application of Title I to parochial schools. It is also important because it shows that this

Court is not unfamiliar with educational administration in the State of Missouri. This Court noted in *Wheeler* that although the Missouri state officials could adopt an on-premises plan, the State also could "approve plans that do not utilize on-the-premises private school Title I instruction." 417 U.S. at 423. This Court pointed out that the State could use neutral sites or summer programs. Id. at 425. In general, this Court preferred not to suggest any particular alternative to on-premises instruction:

> In essence, respondents are asking this Court to hold, as a matter of federal law, that one mode of delivering remedial Title I services is superior to others. To place on this Court, or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies.

Id. Thus, under Wheeler, it is perfectly permissible to have off-premises remedial instruction in the factual setting of *Wamble* in order to avoid government entanglement with religion. What particular off-premises are available or are best-suited to help underprivileged students is beyond the scope of the courts.

CONCLUSION

The record in *Wamble* allows this Court to have a full picture of a remedial, on-premises program that has been in effect for more than five years and on which there is substantial evidence. The cases of *Felton* and *Grand Rapids* do not contain such a comprehensive record. Therefore, for the foregoing reasons, it is respectfully

requested that *Wamble* be given full and plenary consideration before *Felton* and *Grand Rapids*, or in the alternative, that this Court defer its decision in those cases until argument has been heard on the *Wamble* case.

Respectfully submitted,

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